

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**KELLEY FOODS OF ALABAMA, INC.,**

**Plaintiff,**

**v.**

**MYERS NISSI & COMPANY, INC.; a  
corporation d/b/a VERTICALSOFT,**

**Defendant.**

**CIVIL ACTION NO.  
1:04 - cv-01246-MHT-DRB**

**PLAINTIFF KELLEY FOODS' MOTION IN LIMINE**

**COMES NOW** the Plaintiff, Kelley Foods of Alabama, Inc. ("Kelley Foods"), and files this motion in limine to limit Defendant Myers Nissi & Company, Inc.'s ("Myers Nissi") use of expert testimony regarding the performance and functionality of Navision Foundation Software and Process 800.

Kelley Foods anticipates that Myers Nissi may renew its previously filed Motion in Limine to Prohibit Plaintiff from Introducing Any Testimony Regarding the Proper Functioning of, or Alleged Flaws or Deficiencies in, Navision Foundation Software and/or Process 800 Software (Court Doc. 38, 39), wherein it argues that Kelley Foods should not be permitted to introduce "any expert testimony regarding how the Navision or Process 800 software works, whether it works properly, whether it has any flaws or deficiencies, and whether it functions 'as warranted.'" The basis for Myers Nissi's argument is that Kelley Foods did not identify any expert witnesses or disclose any expert reports prior to the Court's September 23, 2005 deadline.

Kelley Foods will file its response to Myers Nissi's motion in limine (if said motion is refiled) in due course. Kelley Foods notes, however, that Myers Nissi likewise did not identify

any expert witnesses or disclose any expert reports prior to its deadline. Therefore, to the extent the Court restricts Kelley Foods from introducing testimony regarding the functionality or performance of the Navision or Process 800 software, Kelley Foods moves the Court to restrict Myers Nissi's evidence in the same manner.

**WHEREFORE, PREMISES CONSIDERED,** Kelley Foods respectfully moves the Court to limit Myers Nissi's use of expert testimony regarding the performance and functionality of Navision Foundation Software and the Process 800 software if the Court so limits Kelley Foods.

Respectfully submitted this the 5th day of February, 2007,

/s/ Elizabeth A. Kleinberg  
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Kelley Foods of Alabama, Inc.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of February, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all properly registered parties and to the extent they are not properly registered with the Court's ECF system, they have been served by directing same to their office addresses via first-class, United States mail, postage prepaid:

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OF COUNSEL